Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, and Swanson
From: Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Repeal and Reenactment of Regulation 18225.7;
Adoption of Regulation Defining Expenditures Coordinated With Candidates

Date: August 23, 2002

Introduction

Under the Act (§ 82025, regulation 18225), an "expenditure" is a payment made for a political purpose. A "contribution" is an expenditure "made at the behest of" a candidate. (§ 82015, regulation 18215.) An "independent expenditure," by contrast, is an expenditure that is *not* made to or at the behest of a candidate. (§ 82031.)

The Commission's guidelines on what constitutes "coordination" are found in regulation 18225.7, which defines expenditures "made at the behest of" a candidate. However, the current regulation defines "made at the behest of" largely by multiplication of synonyms – such as "in cooperation, consultation, coordination, or concert with" – which defer, without answering, practical questions relating to specific relationships and practices.

On March 13 and August 8, staff held Interested Persons' Meetings to measure interest in refined guidelines for coordinated expenditures, and to solicit opinions on how best to approach the task. There seemed to be agreement that better standards were needed, and that these standards should provide objective criteria defining specific conduct that did, or did not, amount to "coordination."

The regulation described in this memorandum treats coordination with candidates, and does not address coordination between committees not controlled by a candidate.[1] On the other hand, this regulation applies to spending by any person, when coordinated with a candidate. This is true of expenditures by committees, including political party committees. In the past, political parties have claimed a special relationship with candidates that makes coordinated expenditures unavoidable, and permissible even in circumstances not permissible for others. The Act does not exempt political parties from coordination rules, and a constitutional entitlement to special consideration was rejected by the Supreme Court in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001), which squarely held that restrictions on coordinated spending by parties were subject to the same scrutiny applied to similar restrictions on others.

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[1] In a separate memorandum, staff will suggest to the Commission that the provisions of regulation 18225.7(a) should be extended through emergency regulation 18225.8 to embrace coordination among committees.

1. Current Definitions of Coordinated Expenditures

The literature on campaign legislation uses a general term, "coordinated expenditures," to include a wide variety of conduct described more particularly in the Political Reform Act, which does not employ a general term. As noted earlier, § 82031 defines "independent expenditure" to exclude expenditures "made at the behest" of a candidate. Section 85500(b) elaborates further:

> "(b) An expenditure may not be considered independent, and shall be treated as a contribution from the person making the expenditure to the candidate on whose behalf, or for whose benefit, the expenditure is made, if the expenditure is made under any of the following circumstances:
> (1)The expenditure is made with the cooperation of, or in consultation with, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate.
> (2) The expenditure is made in concert with, or at the request or suggestion of, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate.
> (3) The expenditure is made under any arrangement, coordination, or direction with respect to the candidate or the candidate's agent and the person making the expenditure."

Current regulation 18225.7 describes expenditures "made at the behest of" a candidate or committee:

> "(a) 'Made at the behest of' means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express prior consent of. Such arrangement must occur prior to the making of a communication described in Government Code Section 82031.
> (b) An expenditure is presumed to be made at the behest of a candidate or committee if it is:
> (1) Based on information about the candidate's or committee's campaign needs or plans provided to the expending person by the candidate, committee, or agents thereof; or
> (2) Made by or through any agent of the candidate or committee in the course of their involvement in the current campaign.
> (c) An expenditure is not made at the behest of a candidate or committee merely when:
> (1) a person interviews a candidate on issues affecting the expending

person, provided that prior to making a subsequent expenditure, that person has not communicated with the candidate or the candidate's agents concerning the expenditure; or

(2) The expending person has obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate's agents."

2. An Overview of the Proposed Regulation[2]

Subdivision (a) of the proposed regulation provides that "made at the behest of" refers to expenditures made at the direction or request of a candidate, or otherwise made in coordination with a candidate. "Coordination" is then described as a general term henceforth incorporating the largely synonymous terms found throughout the Act and in former regulation 18225.7. Staff believes it convenient, at the least, to be able to speak of "coordinated expenditures" without need to list in every case all words included within the concept of "coordination." This subdivision ends with a definition of candidate agents tailored to the context of this regulation.

Subdivision (b) states the general rule that an expenditure made at the direction of a candidate, or otherwise in coordination with a candidate, is a contribution under §§ 82015 and 85500(b). Subdivision (c) lists instances where an expenditure is deemed to be coordinated with a candidate, without presumptions or equivocations. Subdivision (c) is intended to articulate the core definition of conduct that is in all cases "coordination." Subparts specify a variety of activities amounting to coordination; where the candidate requests that an expenditure be made, after a candidate has made decisions on details of the communication funded by an expenditure, or when the candidate has participated in negotiating details of the communication, the result of which is an agreement. Subdivision (c) replicates the provisions of the federal regulation.

Subdivision (d) is not intended to add anything to the definition of "coordination," which is fully defined in the preceding subdivision. Subdivision (d) adds a list of particular cases which give rise to a rebuttable presumption that an expenditure was coordinated with a candidate. These presumptions were developed in part from the Brennan Center proposals, and provide guidance to both enforcement authorities and the regulated community.

Finally, subdivisions (e) and (f) are "safe harbor" provisions specifying that certain activities are not, in themselves, coordination. Persons contemplating expenditures on campaign communications often base their decisions on information gleaned from candidate interviews or responses to questionnaires, and solicitation of informational materials. It should be clear that compliance with such requests, without more, cannot be characterized as candidate coordination, and the routine nature of such activities makes it useful to expressly so state in this regulation. Similarly, subdivision (f) provides

[2] The proposed regulation is attached to this memorandum. Separately attached as "Exhibit A" is an earlier draft of the regulation, as it was presented to the Commission at the July meeting.

that a unilateral response to a publicly disseminated appeal for support will not be considered an expenditure "made at the behest of" a candidate.

When the Commission reviewed an early draft of the proposed regulation at the July meeting, it suggested a number of substantive changes that have been incorporated into the present draft. Material departures from the prior draft, which are not central to decision points addressed later in this memorandum, are summarized below:

- In subdivision (a) the treatment of "agent" did not specify that the conduct of an agent binding on his or her principal must be conduct within the course and scope of the agency. This proviso has now been added.

- In subdivision (d)(1) the term "advisory position" seemed too vague, and the Commission suggested that this term be replaced with the description found at the end of subdivision (d)(2) "or has provided the candidate with non-ministerial…". This language has now replaced "advisory position" in subdivision (d)(1) *and* in subdivision (a), which used the term "advisory position" within the definition of "agent."

- Subdivision (d)(4) referred to materials replicated "in whole or in part." The Commission noted that the exemplars from which this rule had been taken actually stated a more narrow rule applicable to materials replicated "in whole or in *substantial* part." The present draft has been modified accordingly.

- Subdivision (d)(5) appeared to be too broad in the original draft since the presumption of coordination did not require any action by candidates informed of another party's planned expenditures. Rather than drop the presumption altogether, the Commission suggested that it be narrowed. A new clause is therefore added at the end requiring that the candidate signify assent to the expenditure.

3. Specific Decision Points

Decision One: Agents serving "with or without compensation."

As presented to the Commission in July, subdivision (a) provided in its final clause that persons classified as "agents" of the candidate for purposes of this regulation included persons serving the candidate "with or without compensation." The Commission indicated some concern at the inclusion of uncompensated "volunteer" personnel within the definition of "agent." The Commission recognized that many campaigns employ numerous volunteers to serve in many (often ministerial) capacities, and its reservations appear to have been focused on the potential extension of the term "agent" to ordinary campaign volunteers. Staff has accordingly set out alternative rules in language bracketed as "Decision 1," whereby the Commission may either choose to specify that the services of an agent are performed "for compensation" or, alternatively, "with or without compensation."

Staff believes that an agent of a candidate should be defined by his or her actual authority and decisionmaking responsibility in matters of campaign strategy, not job title or compensation status. The same expenditure should not be "independent" of one campaign and a contribution to another, simply because in one case the coordinating consultant was an unpaid volunteer, while in the second case the consultant was paid for the same service.[3]

Staff believes that a sensible approach to the problem of agency makes compensation an unnecessary factor. The determination of agency is normally based on a person's actual or ostensible authority to act and make decisions binding on the principal. There is generally no further requirement that a person with such authority *also* be compensated by the principal. In the context of political campaigns, staff believes that the addition of a compensation requirement would be ill-advised, since many campaigns are run by consultants and advisors who are *not* compensated, particularly at the local level. During the second Proposition 208 trial, the Commission may recall that the FPPC qualified Esther Marks as an expert witness on the strength of her lengthy experience as a political consultant for prominent San Francisco candidates. Notwithstanding her credentials as a campaign consultant, Ms. Marks often spearheaded campaigns without compensation. The spouses of candidates also frequently serve the campaigns in responsible, non-ministerial capacities, without compensation.

The fact is that political campaigns have a tradition of volunteer service at the highest levels, a tradition that continues notwithstanding the recent proliferation of highly paid professionals. *For this reason staff recommends that the Commission determine that an agent may serve as such "with or without compensation."*

Decision Two: Elaborating On Current Presumptions

The Commission's prior comments indicate some fundamental reservations on the propriety of rebuttable presumptions, and Decision 2 therefore brackets the entirety of subdivision (d), against the possibility that the Commission may decide to eliminate this subdivision entirely. There are four sub-parts to Decision 2 relating to details of language pertinent only if the Commission determines in the first instance that subdivision (d) should be retained in some form.

Rebuttable presumptions derive their legitimacy from their treatment of relatively common situations, where it is reasonable to suspect underlying conduct that would meet the definition of "coordination" if all the facts were known, and where those facts are more readily accessible to the actors themselves than to outside observers. Such presumptions are commonly employed in rules

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[3] One of the persons in attendance at the August Interested Persons' meeting pointed out that many treasurers perform purely ministerial bookkeeping functions, and should not be classified among those persons whose activities may establish coordination. The Commission has no control over job titles awarded by campaigns, and can safely assume that treasurers in some campaigns do indeed serve in purely ministerial capacities, while treasurers in other campaigns may exercise strategic decisionmaking authority. Staff has added language to the regulation specifying that the "campaign-related services" that may give rise to a presumption of coordination are services that relate to campaign strategy.

regarding coordinated campaign expenditures, and indeed are featured in the currently existing regulation.

Nevertheless, because a rebuttable presumption shifts the burden of producing evidence to the respondent – once the prima facie case has been made – they are sometimes challenged as unduly burdensome. Responding to such concerns, the Commission asked in July how a respondent could vindicate himself in the face of such a presumption. A timely answer was provided a month later by the United States Court of Appeals for the Second Circuit, in the course of its lengthy opinion on Vermont's campaign finance legislation:[4] The Court first found that "[t]he Constitution does not bar the use of rebuttable presumptions in this context." (*Id*. at *31.) The Court then addressed the precise concern raised by the Commission in July, as follows:

> "The plaintiffs' argument that the presumption is functionally conclusive because one 'cannot prove a negative' is, at least in the legal arena, inaccurate. There are ample strategies that an accused party can employ to demonstrate that an expenditure was truly independent from the candidate it supported. The party can, for example, testify that no discussion took place with the candidate about advertising strategies, including the sharing of information about advertising plans. Candidates can testify that they never gave feedback on an independent advertising scheme or that the third parties never solicited such feedback. Adjudicative bodies can take such evidence, or other similar testimony, as proof and infer a lack of coordination." (*Id*. at *32.)

Persons described in subdivision (d) are placed on notice that their actions may or may not violate the Act, but because they are close to the legal "line," they may be required to produce evidence that the expenditures at issue did not involve coordination.[5] These pre- sumptions will not only aid enforcement authorities in situations where evidence is typically under the control of the respondents, but they will educate the regulated community on situations requiring caution, furthering the purposes of the Act in each case.

Staff does not anticipate that these presumptions will cause a net increase in enforcement activity. The circumstances under which the presumptions apply naturally generate suspicions of coordination in any event, and those cases will be investigated to the extent that resources permit, whether or not presumptions are included in the regulation. Evidence sufficient to rebut a presumption

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[4] *Landell et al. v. Vermont Public Interest Research Group, et al*., 2002 WL 1803685 (2d Cir., August 7, 2002).

[5] For example, under (d)(1), a former campaign consultant might have to establish that he had had no discussions with the candidate regarding the expenditure; under (d)(2), the person making the expenditure might have to show that the retained professional was not acting on the candidate's behalf; under (d)(3), that the information was acquired from the candidate in circumstances not involving discussion of the planned expenditure; under (d)(4), that the inspiration to reproduce the candidate's materials did not come from the candidate; under (d)(5), that discussions with the candidate involved a one-way information flow (towards the candidate), rather than two-sided negotiation leading to a change of plans at the candidate's request or suggestion.

would normally be offered (where possible) in any enforcement proceeding, and at the earliest possible stage regardless of the regulation in effect.

Staff believes that unsuccessful prosecutions may be less common if the regulation contains subdivision (d) intact, but *not* because innocent respondents are unable to rebut a presumption. Instead, because these presumptions focus on circumstances where coordination is especially likely, they serve a positive educational function by alerting members of the regulated community to situations warranting special attention. Some may be happy to avoid conduct that gives rise to suspicion. Others, who make an informed choice to act in a manner that triggers a presumption, are more likely to have ready the material necessary to rebut the presumption, and if an investigation is begun, they will use it to defeat a finding of probable cause.

Staff recommends inclusion of subdivision (d) because it offers a clearer alternative to the presumptions listed in subdivision (b) of the current regulation, and more generally because a list of presumptions alerts the public and the regulated community to the inescapable fact that certain patterns of conduct or relationships make coordination more likely to occur, even if unintended. The complexities inherent in the conduct addressed by regulation 18225.7 make it very useful to identify not only conduct which, without more, is *always* coordination, and conduct which, without more, is *never* coordination (the "safe harbor" provisions at the end of the regulation), but also to highlight circumstances that signal the presence of underlying reefs and shoals.[6]

Decision 2 asks whether the Commission agrees in principle that subdivision (d) is a useful compliment to the surrounding provisions. If the Commission finds that a set of presumptions is desirable, it should next turn to the details of the presumptions actually on the table. The Commission's first consideration, as suggested earlier, should be whether the circum- stances giving rise to the presumption would naturally generate suspicions of coordination, while the crucial evidence would tend to be more readily accessible to respondents.

Decisions 2a and 2b call attention to a matter in subdivisions (d)(1) and (d)(2) that the Commission found troublesome in the draft regulation reviewed at the July pre-notice discussion. In addressing prior service with the candidate, both of these subdivisions applied in the original draft to service "within twelve months prior to the expenditure." Some of the Commissioners found this period too lengthy, and/or desired a tighter "nexus" between prior and present service by applying the presumption only within the same "election cycle" during which the expenditure is made. With the passage of Proposition 34, the Act now defines "election cycle" at § 85204:

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[6] It should be noted that the inclusion of presumptions does not make this regulation inconsistent with the views articulated in the *Davis* Advice Letter, No. I-90-173. The *Davis* letter was written in 1990, five years before the Commission decided to write presumptions into regulation 18225.7. The *Davis* letter considered no questions relating to presumptions, and accordingly had nothing to say on the subject. Staff believes that the conclusions reached in the *Davis* letter would also be reached under subdivision (c) of the proposed regulation, which defines coordination.

> " 'Election cycle' for purposes of Sections 85309 and 85500, means the period of time commencing 90 days prior to an election and ending on the date of the election."

If the term "election cycle" is to be employed in regulation 18225.7, it should have the meaning given to it by § 85204, to avoid the confusion that grows up around a defined term with more than one meaning. But there is some question as to whether a term stating a period of time within which expenditures are reported may usefully be applied to specify the period within which coordination *preceding* those expenditures will be presumed. This is especially true when § 85204 is not used to define the entire span of a campaign, but only a late stage when electronic reporting is critical to providing observers with rapid updates on fast-breaking events typical of the weeks immediately preceding election day.

The Commission may recall that California shifted its primary elections to March in 1996 to ensure that the nation's most populous state had a more than nominal role in deciding presidential contests. That move, however, has left an eight month space between California's primary and general elections. An "election cycle" that begins only 90 days before an election makes sense when there is little campaign activity four to eight months prior to an election, and correspondingly little opportunity for coordinated expenditures.

But it is generally recognized that the campaign season for many offices has lengthened in California, and that some candidates campaign year round. It may be unrealistic to suppose as a general rule that candidates who have built up momentum for a March primary allow that momentum to dissipate during the five months between the primary election and the beginning of an "official" 90 day election cycle in August. Just last February, Governor Davis spent $10 million in what is generally described as an effort to influence the *Republican* primary, the point of which was to ensure the Governor's success in the general election still nine months away.

The Commission may conclude that the 90 day "election cycle" of § 85204 does not reasonably define the period during which campaign expenditures are planned, coordinated, and made. If this "nexus" is questionable because the statute does not match campaign realities in this context, a more lengthy period may be better suited to a regulation that treats campaign planning and coordination. In other words, the Commission may wish to qualify subdivisions (d)(1) and (d)(2) by a period of time long enough to include most campaign planning, but no longer than necessary for that task. Twelve and six month periods are offered as alternatives. *Staff does not recommend integration of the term "election cycle" into this regulation. As between the other two alternatives, staff has no preference.*

Decision 2c involves the addition or omission of twelve words at the end of subdivision (d)(2), which were added after the Commission expressed reservations on this provision. The Commission thought that the presumption might be unwarranted if triggered by the mere fact that a person who

provides (or recently had provided) campaign-related services to the candidate happened to be employed by a person making expenditures on the campaign. As originally written, this subdivision presumed coordination from the fact of joint employment, and non-ministerial employment by the campaign. Revised and added language would require that the employment involve services relating to campaign strategy, and that the prima facie case establish not only these facts, but the *additional* fact that the person in question is actually involved in decisions regarding the expenditure.

The latter, additional showing narrows the presumption, but it does so by requiring evidence in the prima facie case that in many instances would leave little to be established at trial. From a prosecutorial perspective, the point of the presumption was to require the respondent to produce evidence on the expenditure, showing non-involvement in the expenditure either by the candidate or by the person jointly employed. Such evidence is more readily produced by the respondent, as noted in the *Landell* decision quoted earlier, than it is by an enforcement authority which, without cooperation from either the candidate or the employee, literally *would* be required to prove a negative. *For this reason, staff recommends against adoption of the additional requirement at issue in Decision 2c.*

Decision 2d relates to the inclusion of subdivision (d)(5) in regulation 18225.7. Staff noted in July that subdivision (d) is organized to include the most conservative presumptions first. The Commission found subdivision (d)(5), as presented in July, to be over-broad, and directed staff to add narrowing language, which appears as the final clause "and the candidate signifies assent to the expenditure." This addition cures the defect noted by the Commission. A requirement of candidate assent ensures that coordination will not be presumed if the candidate is merely the passive recipient of eleventh-hour news.

While the current language addresses the Commission's reservations, the addition of an "assent" requirement undermines the point of the presumption insofar as a prosecuting agency with proof of candidate assent would not need to invoke a presumption to establish coordination, since the prima facie case includes all the elements decisive under subdivision (b). The Commission may, however, decide that this presumption has an independent justification in alerting the regulated public of the dangers inherent in communicating such details to the candidate prior to making the expenditure. *Staff has no recommendation on this decision point.*

Decision Three: A New "Safe Harbor" Provision

Decision 3 proposes to add a third provision to the existing "safe harbor" rules set forth in subdivision (e). Proposed subdivision (f) was not discussed with the Commission in July because the need for it only became apparent late in the month when the Technical Assistance Division fielded a question that pointed out, in essence, that a perfectly reasonable, literal interpretation of the term "at the behest of" would lead to a conclusion inconsistent with the apparent intent of the law. The caller pointed out that a person who makes an expenditure on behalf of a candidate, without contact of any sort with the candidate, would nonetheless be acting "at the behest of" a candidate if the person making the expenditure was motivated by a generalized request for support made by the candidate in a

television broadcast. *Because a thoroughly unilateral response to a generalized appeal for support seems inconsistent with the root meaning of "coordination," staff has added subdivision (f) for consideration, and urges that it be included in the regulation.*

Recommendations

In summary, staff recommends adoption of the proposed regulation 18225.7 and, more specifically:

Decision 1: staff recommends inclusion of the language "with or without compensation;"
Decision 2: staff recommends inclusion of subdivision (d);
Decision 2a and 2b: staff recommends against the 90 day period defined as an "election cycle" under § 85204, but has no preference as between 12 and 6 months;
Decision 2c: staff recommends against adopting the additional, limiting language;
Decision 2d: staff has no preference;
Decision 3: staff recommends inclusion of subdivision (f) in the regulation.